SEEMA DEVELOPMENT SDN BHD

v.

MAH KIM CHYE & ANOR

HIGH COURT MALAYA, IPOH
ABDUL HAMID EMBONG J
[CIVIL SUIT NO: 23-404-86 & 23-405-86]
30 SEPTEMBER 1997

CIVIL PROCEDURE: *Injunction - Mareva injunction - Mareva injunction to restrain release of compensation sum - Application made after trial - Rules of the High Court 1980, O. 29 r. 1(1) - Plaintiff's burden of proof - Real danger of dissipation - Undertaking as to damages, whether can be dispensed with - Bar to grant of injunction - Specific Relief Act 1950, s. 54(b) & (i)*

The court had earlier ordered the defendant to refund the plaintiff the money it received from the plaintiff under a sale and purchase agreement in respect of the defendant's land ('the said land') after that agreement fell through ('the said judgment'). The defendant had failed to satisfy the judgment debt.

A portion of the said land had earlier been acquired by the government and a sum of money had been deposited in court as compensation to the defendant. The present case was an application by the plaintiff for a post judgment *Mareva* injunction to restrain the defendant from applying to the High Court for the release of the compensation sum until the said judgment was satisfied.

The affidavits supporting the plaintiff's application affirmed that the defendant is now residing in Australia and that he has no other assets except for the said land. The defendant submitted that the plaintiff had to show that there was a real risk of the assets being taken out of jurisdiction. He further submitted that the plaintiff had not given any undertaking in damages, and that the court's jurisdiction to grant an injunction was barred by s. 54(b) of the Specific Relief Act 1950 ('the SRA').

Held:

[1] An application for the grant of an injunction may be made before or after the trial of a cause or matter. It is well illustrated from case laws that the court is seised with the power to grant an interlocutory injunction between final judgment and execution, and that *Mareva* injunction may be used to aid execution.

[2] The most important ingredient to consider before granting a *Mareva* injunction is whether there is any real danger of the assets being dissipated. The risk of dissipation must not just be a mere possibility, but almost a certainty. A mere belief is insufficient to support an application for *Mareva* injunction.

[3] The fact that the plaintiff has succeeded in the main suit does not dislodge the settled principle that the onus remains with the plaintiff to establish a *prima facie* case for the grant of a *Mareva* injunction, and only if the court is so satisfied, will it consider the evidence adduced by the defendant to determine if that *prima facie* case has been displaced.

[4] There was no evidence to show that there was any risk of disposal of the defendant's assets. The fact that the defendant resides in Australia, by itself, was no ground to allow the application. To succeed, the plaintiff must show to the satisfaction of the court that there was a real danger of the defendant moving his assets beyond the court's jurisdiction in order to deprive the plaintiff of its judgment.

[5] Section 54(b) of the SRA had no application in the instant case as the injunction was merely to restrain the defendant from withdrawing the deposited money and was not meant to stay the proceedings on the land acquisition matter which is still pending before the High Court.

[6] However, the court was precluded from granting the injunction in view of s. 54(i) of the SRA. The relief available to the plaintiff was provided for under O. 45 of the Rules of the High Court 1980 ('RHC'). It had not been shown that the plaintiff had attempted to enforce its judgment *via* any of the modes provided in the RHC. The court cannot exercise its inherent powers to nullify or stultify a statutory provision.

[7] The plaintiff had succeeded in its suit and was now before the court as a judgment creditor to realise its judgment debt. As such, the ordinary requirement of an undertaking in damages given in interlocutory injunction applications may be dispensed with in a situation like this. Even though an undertaking in damages is normally required of a plaintiff applying for a *Mareva* injunction, it remains flexible in application.

[Application dismissed with costs.]

Cases referred to:

Allen v. Jambo Holdings Ltd [1980] 2 All ER 502 ***(refd)***

Ang Chee Huat v. Thomas Joseph Engelbach [1995] 2 CLJ 893 ***(refd)***

Government of Malaysia v. Lim Kit Siang [1988] 2 MLJ 12 ***(refd)***

Hock Hua Bank (Sabah) Bhd v. Yong Liu Thin & Ors [1995] 2 CLJ 900 ***(refd)***

Mareva Compania Naviera SA v. International Bulkcarriers SA [1975] 2 Lloyd's Rep 509 ***(refd)***

Orwell Steel (Erection and Fabrication) Ltd v. Asphalt and Tarmac (UK) Ltd [1984] 1 WLR 1097 ***(refd)***

Pacific Centre Sdn Bhd v. United Engineers (M'sia) Ltd [1984] 2 MLJ 143 ***(refd)***

Petowa Jaya Sdn Bhd v. Binaan Nasional Sdn Bhd [1988] 2 MLJ 261 ***(refd)***

Third Chandris Shipping Corp & Ors v. Unimarine SA – The Pythia, The Angelic Wings, The Genie [1979] 2 All ER 972 ***(refd)***

Z Ltd v. AZ [1982] 1 All ER ***(refd)***

Zainal Abidin Abdul Rahman v. Century Hotel Sdn Bhd [1982] 1 MLJ 260 ***(cit)***

Legislation referred to:

Land Acquisition Act 1960, 29(2)

Rules of the High Court 1980, O. 29 r. 1(1), O. 45

Specific Relief Act 1950, s. 54(b), (i)

For the plaintiff - Yeow Khoon Kwong; M/s Yeow & Co

For the defendant - David Chai; M/s Woo Yew Choe & Co

JUDGMENT

Abdul Hamid Embong J:

Two similar *inter partes* applications viz encl. 65 in GS. 404-86 and encl. 49 in GS. 405-86, were made by the plaintiff seeking for a post judgment Mareva injunction couched in the following words:

> The defendant whether by himself, his servants or agents or otherwise be restrained from applying to the High Court for the payment out of the sum of RM144,202.72 standing to the credit of the defendant in court being compensation for the compulsory acquisition of 0.99515 hectre of the land held under H.S.(D) L.P. No. 572/79 for lot P.T. 1965 in the Mukim of Durien Sebatang in the District of Hilir Perak awarded by the Collector of Land Revenue for Hilir Perak and deposited in the High Court by the said Collector pursuant to an Order made in Ipoh High Court Originating Summons No. 21-48-89 and from receiving payment from the Accountant General Malaysia before the full settlement of the judgment dated 17 October 1996 obtained by the plaintiff in this suit.

On 17 October 1996 this court had, after a full trial of both civil suits, allowed the plaintiff's claim for a refund of the money it had paid to the defendant under a sale and purchase agreement of the defendant's land held under H.S.(D) L.P. 572/79, PT. 1965 Mukim Durien Sebatang (the subject land) after that agreement fell through. Part of the subject land had earlier been acquired by the government and a sum of RM144,202.72 as compensation had been deposited in court under s. 29(2) of the Land Acquisition Act 1960. The deposited money is now the target of the injunction sought by the plaintiff in these applications, which were jointly heard.

The applications are supported by the affidavits of Kuan Peng Hang @ Kwan Peng Hong, the managing director of the plaintiff. In those affidavits it was affirmed that the defendant is now residing in Australia, that he had no other assets save for subject land, and that the plaintiff believed that the defendant is avoiding execution, and further to allow the defendant to withdraw the money deposited in court would jeopardize the plaintiff's position because the former might dissipate or remove the asset out of jurisdiction.

Learned counsel for the plaintiff had submitted that the subject land itself would not be sufficient to satisfy the judgment debt, now standing at RM330,783.99. He also contended that there had been no attempt by the defendant to satisfy the judgment debt or any part of it and that his continued delay to do so was an indication of avoidance. These applications he argued, are within this court jurisdiction and would aid the execution of the judgment.

Learned counsel for the defendant while admitting that the grant of an injunction was entirely within this court's discretion, submitted that, on the dissipation point, the plaintiff must show that there was a real risk of the assets being taken out of jurisdiction. He contended that merely showing that the defendant resided abroad was no ground for allowing these applications. He further submitted that the plaintiff had not given any undertaking in damages, a condition precedent to the granting of an injunction. Counsel also questioned this court's jurisdiction to grant an injunction citing s. 54(b) Specific Relief Act 1950 (SRA), as a bar. He argued that the acquisition proceeding is still in progress by way of an objection before another High Court and as such to grant this injunction would have the effect of staying the proceedings before that Court and this contravenes the said s. 54(b) SRA.

Order 29 r. 1(1) of the Rules of the High Court provides that an application for grant of an injunction may be made before or after the trial of a cause or matter. That this court is seised with the power to now grant this injunction is well illustrated in *Orwell Steel (Erection and Fabrication) Ltd. v. Asphalt and Tarmac (UK) Ltd.* [1984] 1 WLR 1097 where it was held that the Court

had the power to grant an interlocutory injunction between final judgment and execution. Farquharsan J at p. 1100 further held that a Mareva injunction may be used to aid execution. His Lordship stated:

> If there is such a power, there seems to be no logical reason why a Mareva injunction should not be used in aid of execution. Indeed, in one sense it could be said that there is greater justification for restraining a defendant from disposing of his assets after judgment than before any claim has been established against him. It is true that there is a variety of methods for enforcing execution as set out in RSC O. 45 r. 1 and once the plaintiff has obtained judgment it may be said that he should pursue the remedies provided by the rules rather than extend the application of Mareva injunctions still further. The answer to that objection is that, as has been frequently pointed out, the Mareva injunction acts *in personam* on the defendant and does not give the plaintiff any rights over the goods of the defendant nor involve any attachment of them. In this context it would have the effect of preserving the defendant's goods until execution could be levied upon them; and the remedies of injunction and execution can take effect side by side. Such was the view of Robert Goff J in *Stewart Chartering Ltd. v. C & O Managements SA* [1980] 1 WLR 460 where he continued a Mareva injunction granted before judgment in aid of execution. Plainly an injunction will only be granted where the plaintiff can adduce evidence of a kind which normally supports an application for a Mareva injunction, namely, that there are grounds for believing that the judgment debtor will dispose of his assets to avoid execution. Perhaps such grounds may be more readily established after judgment than before it. The present application was therefore granted.

There is no scarcity of authorities stating that the most important ingredient to consider before granting a Mareva injunction, is whether there is any real danger of the assets being dissipated. See *Ang Chee Huat v. Thomas Joseph Engelbach* [1995] 2 AMR 1323, where the Court of Appeal agreed with Peh Swee Chin J in *Petowa Jaya Sdn. Bhd. v. Binaan Nasional Sdn. Bhd.* [1988] 2 MLJ 261 where the learned judge held that "The risk of dissipation was not just a mere possibility, but almost a certainty."

In this case it was alleged that the defendant, if not restrained, might dissipate his assets. But having scrutinised the affidavits and considering counsel's submission, I find no evidence to show that there was any risk of disposal of the defendant's assets. That allegation at best, remained a mere speculation. Similarly, the fact that the defendant resided in Australia, by itself, is no ground to allow these applications. The plaintiff must show to the satisfaction of this court that there was a real danger of the defendant moving his assets beyond this court's jurisdiction in order to deprive the plaintiff of its judgment. Again, the plaintiff's affidavits in support failed to adduce any evidence to show that that risk existed. A mere belief, as asserted by the plaintiff here, is itself insufficient to support its case.

I find support in so holding from the Court of Appeal case of *Third Chandris Shipping Corporation & Ors. v. Unimarine SA – The Pythia, The Angelic Wings, The Genie* [1979] 2 All ER 972, decided shortly after *Mareva Compania Naviera SA v. International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509 – from which this kind of relief derived its name – where it was held, *inter alia,* (per Lord Denning MR) that the plaintiff should give some grounds for believing that there was a risk of the assets being removed before the judgment or award was satisfied; the mere fact that the defendant was abroad was not by itself sufficient. But proof on the risk of removal of asset alone is insufficient to move this court to exercise its jurisdiction. The plaintiff also needs to show that, beyond that, there is also a danger of default by the defendant or as Lord Justice Kerr in *Z Ltd. v. AZ* [1982] 1 All ER puts it:

> ... the danger of the defendant dissipating his assets to make himself judgment-proof.

In an early Mareva case here, in *Pacific Centre Sdn. Bhd. v. United Engineers (M'sia) Ltd.* [1984] 2 MLJ 143, Edgar Joseph Jr. J (as His Lordship then was) expressed his view on the plaintiff's burden of proof, in the following dictum which I now quote and adopt:

> Because in many case, there will be a practical difficulty of proving the requisite intent, I prefer the view that it would be sufficient for the plaintiff to merely show a risk of disposal of assets which has the effect of frustrating the plaintiff in his attempt to recover the fruits of a judgment he is likely to obtain against the defendant. I am fortified in this view by the following short dictum in the judgment of Raja Azlan Shah CJ (Malaya) *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd:*
>
> > ... In our opinion the disappearance which the appellant fears in this case of the proceeds of sale does not come within the concept of disposing of assets with the intention or with the effect of defeating a claim.

In the *Mareva* case, it was held that the plaintiff must show that the defendant was likely to default if judgment was given against the latter.

In the instant case, although the defendant had failed to file an affidavit in reply, this court is duty bound in an application of this nature, to scrutinise independently the allegations made by the plaintiff in its affidavit. In *Hock Hua Bank (Sabah) Bhd. v. Yong Liu Thin & Ors.* [1995] 2 MLJ 213, a case involving an application for a Mareva injunction, the Court of Appeal, speaking through Gopal Sri Ram JCA said at p. 1340:

> Imposing a restraint upon a man from dealing with what is *prima facie* his property is a very serious matter indeed. It is for that reason that equity requires the parties to submit their respective cases to a critical scrutiny by the court.

That the plaintiff had succeeded in the main suits does not dislodge the settled principle that the onus remains with the plaintiff to establish a *prima facie* case for the grant of a Mareva injunction, and only if the court is so satisfied, will it consider the evidence adduced by the defendant to determine if that *prima facie* case had been displaced. (see *Pacific Centre Sdn. Bhd. v. United Engineers (M'sia) Ltd.* [1984] 2 MLJ 143, also *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd.* [1982] 1 MLJ 260). The allegations made by the plaintiff, although unanswered, must, on their own, be scrutinised to determine if the plaintiff had discharged its burden. I also rely on the advice by Lawton LJ in the *Third Chandris Shipping* case given to judges in considering the affidavit in support of an application for a Mareva injunction. His Lordship observed:

> Further they should remember that affidavits asserting belief in, or the fear of, likely default have no probative value unless the sources and grounds thereof are set out: see RSC O. 41 r. 5(2). In my judgment an affidavit in support of a Mareva injunction should give enough particulars of the plaintiff's case to enable the court to assess its strength and should set out what enquiries have been made about the defendant's business and what information has been revealed, including that relating to its size, origins, business domicile, the location of its known assets and the circumstances in which the dispute has arisen. These facts should enable a commercial judge to infer whether there is likely to be any real risk of default.

These applications turn on the evidence and in the circumstances, I find the plaintiff's allegation on dissipation, as *prima facie* unsubstantiated.

Turning now to the issue of law viz, this court's lack of jurisdiction to determine these applications. The applications are in essence for a grant of a perpetual injunction, which would be subservient to the statutory constraints of s. 54 of the SRA. (*Government of Malaysia v. Lim Kit Siang United Engineers (M) Bhd. v. Lim Kit Siang* [1988] 2 MLJ 12, per Adoolcader SCJ).

Section 54(b) of the SRA provides that:

> 54. An injunction cannot be granted –
>
> (a) ...
>
> (b) to stay proceedings in a court not subordinate to that from which the injunction is sought;

It was common ground that the acquisition matter on the subject land is pending decision before another High Court. This injunction, if allowed, is merely to restrain the defendant from withdrawing the deposited money. It is not meant to stay the proceedings now pending before the other High Court. As such, s. 54(b) SRA, in my view, is not applicable to the instant situation. That however, is not the end of the matter. Section 54 SRA provides another bar to a grant of an injunction *vide* para. (i) thereof which states:

> (i) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust;

As I see it, the relief available to the plaintiff, is provided for under O. 45 RHC. Suffice to say that these applications would be superfluous if the plaintiff had resorted to and succeeded in enforcing its judgment under the said Order. It has not been shown that the plaintiff had attempted to enforce its judgment via any of the modes provided in that Order. In the circumstances, it is my finding that this court is precluded from granting this injunction. The court cannot exercise its inherent power to nullify or stultify a statutory provision.

On the question of the requirement of an undertaking in damages, which the defendant's counsel submitted was a prerequisite, but not given in these applications, I find myself in agreement with plaintiff's counsel when he said that the circumstances in this case were different from an application for an interlocutory injunction, in that, the plaintiff had succeeded in its suit and was now before this court as a judgment creditor to realise its judgment debt. As such, the ordinary requirement of an undertaking in damages given in interlocutory injunction applications may, in my view, be dispensed with here. Although the giving of an undertaking in damages is normally required of a plaintiff applying for a Mareva injunction – it being one of the guidelines propounded by Lord Denning MR, in the *Third Chandris Shipping* case – it remains flexible in application. Thus, in *Allen v. Jambo Holdings Ltd.* [1980] 2 All ER 502, the Court of Appeal held that an undertaking was not required of a poor plaintiff.

The court's discretion to grant a Mareva injunction should be exercised cautiously and sparingly. These applications did not show the merits to move this court to exercise that discretion. They were therefore dismissed with costs.

Reported by Ling Hea Hoon

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